No. 22228

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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MONROE STREET PROPERTIES, INC., an Arizona corporation, Appellant,

v.

ORVILLE S. CARPENTER, TRUSTEE, etc., Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

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1118 Arizona Title Building
Phoenix, Arizona 85003

Attorneys for Appellant

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Jurisdictional Statement

Summary Judgment was granted herein in favor of the appellee, defendant in the lower court, and against the appellant, plaintiff in the lower court, on August 11th, 1967, and entered by the Clerk of the Court on August 15th, 1967, the action having been filed in the United States District Court for the District of Arizona. That court had jurisdiction by virtue of the diversity of citizenship between the parties, the fact that the amount in controversy exceeds $10,000.00 and by reason of the provisions of Title 28, U.S.C. [T.R. page 1].

This court has jurisdiction of the appeal by virtue of Title 28, § 1291, U.S.C.

Statement of the Case

Western Equities, Inc., now known as Westec (presently in reorganization in the District Court of the United States for the Southern District of Texas, No. 66-H-62, Orville S. Carpenter, Trustee) did on or about March 27th, 1962, submit an offer in writing, via Union Title Company, to purchase from Monroe Street Properties, Inc., ten (10) first mortgages and notes, having a face value of $1,250,000.00 for $1,000,000.00 of the common capital stock of Western Equities, Inc., now known as Westec, based upon the value of said stock at the closing market price as shown on the American Stock Exchange thirty days prior to the ratification of said written offer. [See Exhibit "A" attached to plaintiff's Complaint, T.R. page 5].

The offer was ratified on March 27th, 1962, and on March 30th, 1962, the parties further implemented their contract, admitted by appellee in its Motion for Summary Judgment, by entering into escrow instructions with Union Title Company, under Escrow No. 115 185, which escrow instructions were annexed to plaintiff's Complaint [T.R. page 8].

By the terms of said escrow agreement, Monroe Street Properties, Inc., was to provide certain items to the escrow agent or stakeholder and appellee was likewise to deposit certain items to the stakeholder, Union Title Company, which was so designated by agreement between the parties. On or about April 10th, 1962, defendant in the court below was informed by a responsible officer, agent and employee of Union Title Company, that Monroe Street Properties, Inc., had performed all of its obligations incumbent upon it under the escrow agreement and that it had deposited the consideration for the contract, *i.e.*, the ten notes and mortgages, which the said Union Title Company would insure in favor of appellee as first mortgage liens. A copy of said notification was annexed to appellant's Response to the Motion for Summary Judgment as Exhibit "A" [T.R. page 101].

Thereafter, on April 11th, 1962, the stakeholder, Union Title Company, again informed appellee in writing that appellant had complied with those provisions of the escrow incumbent upon it and requested that the appellee deposit 252,207 shares of its common capital stock to the escrow, as agreed upon. A copy of said

communication was annexed to the Response to the Motion for Summary Judgment and marked Exhibit "B" [T.R. page 102].

On April 12th, 1962, appellee by and through one of its authorized officers, responded to Union Title Company's demand in writing, informing Union Title Company that according to the contract between the parties, the compliance date for the delivery of the stock was to be the day said stock was approved by the American Stock Exchange to be issued to appellant and that such application was pending. Further, said officer requested the delivery of copies of the mortgages, notes and Memorandum Title Report. A copy of said communication was annexed to the Response to the Motion for Summary Judgment and marked Exhibit "C" [T.R. page 103].

In reply, Union Title Company did, on May 7th, 1962, transmit to Richard B. Snell of the law firm of Snell & Wilmer copies of: (1) the preliminary Title Report with amendment; (2) a copy of the executed escrow instructions; (3) copies of each mortgage, note and assignment and a copy of the original offer to contract. Said communication further informed

appellee's counsel that the M.A.I. appraisal had theretofore been delivered directly to Mr. Lee Ackerman, President of Western Equities, Inc. A copy of said communication was attached to the Response to the Motion for Summary Judgment and marked Exhibit "D" [T.R. page 104].

Thereafter, no further communications were had from appellee. No notice of cancellation of escrow was received; no written rescission of the contract of 27th and 30th March was received, despite demands for the delivery of said stock.

The affidavit of James E. Mack, the then Vice President of Union Title Company, annexed to the Response to the Motion for Summary Judgment [T.R. pages 96 through 100] states that all of the requirements of the Memorandum Title Report could have been fulfilled had the stock been delivered.

On June 27th, 1962, Ira S. Broadman, counsel for appellant at that time, made further demand for the delivery of said stock and offer of tender of performance, a copy of said letter being annexed to appellee's Motion for Summary Judgment and marked Exhibit "B" [T.R. page 52].

Plaintiff filed its Complaint for Breach of Contract on or about the 21st day of October, 1966. Thereafter, various pleadings were submitted to the court, and on March 31st, 1967, defendant in the lower court filed its Motion for Summary Judgment, annexing thereto two affidavits, to wit: the affidavit of Richard Snell and the affidavit of Marie Peipelman and certain exhibits. On May 12th, 1967, plaintiff filed its Response to the Motion for Summary Judgment, annexing thereto the affidavit of James E. Mack and documents referred to in his affidavit.

Hearing was subsequently had on said Motion, and on August 11th, 1967, the trial court granted the same in favor of defendant and thereafter this appeal was perfected.

Specifications of Error

I. The trial court erred in granting appellee's Motion for Summary Judgment in that the pleadings, affidavits, interrogatories, and exhibits of record disclose that material issues of fact exist.

II. The trial court erred in granting appellee's

Motion for Summary Judgment in that by so doing, the court tried disputed issues of fact.

III. The trial court erred in considering the affidavits of Richard Snell and Marie Peipelman in that said affidavits are at best hearsay and opinion documents, contain the affiants' conclusions of law and do not conform with the requirements of Rule 56(e), Federal Rules of Civil Procedure.

IV. The trial court erred in making Findings of Fact and Conclusions of Law and in so doing it found facts not contained in the record, nor accurately represented therein and drew conclusions of law contrary to the decisions interpreting such facts. Rule 56(a), Federal Rules of Civil Procedure.

Argument

I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN THAT THE PLEADINGS, INTERROGATORIES, AFFIDAVITS AND EXHIBITS OF RECORD DISCLOSE THAT MATERIAL ISSUES OF FACT EXIST

The gravamen of this appeal is that in view of appellant's contention that material issues of fact exist, which the court cannot determine on a motion for

summary judgment, the trial court erred in granting said motion. Hence, at the outset, it is helpful to concisely review the office of a motion for summary judgment.

Rule 56(c), Federal Rules of Civil Procedure, provides in part:

> " * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law."
> (Emphasis supplied)

Hence, a motion for summary judgment lies only when there is no genuine issue as to any material fact.

Rule 56 clearly describes the procedure for invoking the rule and sets forth, with clarity, the limitations imposed upon the court in determining such motions. Counsel would recommend to the Court's attention the statement found in 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1231, page 101:

> "On a motion for summary judgment the court cannot try issues of fact. It can only determine whether there are issues to be tried. * * * Summary judgment is not proper where the material facts are uncertain. It cannot be used to determine questions of fact

> without an adequate and proper hearing. Rule 56 is not merely a directory but affects the substantial rights of the litigants and since it provides a somewhat drastic remedy, it must be used with due regard for its purposes and a cautious observance of its requirements in order that no person will be deprived of a trial on disputed factual issues."

Cases enunciating this theory are legion, and for illustrative purposes, we cite the following: *Jacobson v. Maryland Cas. Co.*, 336 F.2d 72 (C.A. Mo. 1964), *cert. den.* 85 S. Ct. 655; *Technograph Printed Circuits Ltd. v. Methode Electronics Inc.*, 356 F.2d 442 (C.A. Ill. 1966), *cert. den.* 86 S. Ct. 1570; *Short v. Louisville & N.R. Co.*, 213 F. Supp. 549 (D.C. Tenn. 1962).

II. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN THAT BY SO DOING THE COURT TRIED DISPUTED ISSUES OF FACT

Appellant submits that the learned trial court, in determining appellee's motion, unwittingly perhaps, but nevertheless surely, fell into the trap of "trial by affidavit." A cursory comparison of the affidavits submitted by the parties in support of their respective positions clearly discloses the existence of material

issues of fact. Appellee's position is supported by the affidavit of Richard Snell [T.R. pages 48 to 51] and the affidavit of Marie Peipelman [T.R. pages 61 through 81 inclusive]. Appellant's position is supported by the affidavit of James E. Mack [T.R. pages 91 through 100].

The gist of appellee's motion is that notwithstanding the contract entered into between the parties, it was the opinion of appellee or appellee's counsel that appellant could not perform the duties incumbent upon it pursuant to the contract, which was admitted by the appellee, *i.e.*, the delivery of ten insured first realty mortgages having a face valuation of $1,250,000.00. The reasoning of appellee giving rise to this conclusion stemmed ostensibly from the opinion of the condition of title of Marie Peipelman and the Memorandum Title Report annexed to appellee's Motion for Summary Judgment [T.R. pages 61 through 81]. A careful examination of the Response by appellant to appellee's Motion for Summary Judgment, and the affidavit of James E. Mack [T.R. pages 96 through 100], clearly and unequivocally disputes the factual issue of whether or not appellant could perform its agreement.

It seems apparent that in order for the court below to have granted the motion, as it did, it had of necessity to ignore the Mack affidavit which controverts with particularity the material statements contained in the Snell and Peipelman affidavits.

In his affidavit, Mr. Snell states the following opinions which, for convenience sake, are summarized herein:

1. To his knowledge, none of the requirements contained in the Memorandum Title Report of Union Title Company had been met [T.R. page 49, line 28].

2. Appellant was not in a position to deliver first lien mortgages [T.R. page 49, line 32 through page 50, line 1].

3. By reason of the multiple liens upon the properties, appellant could not in the foreseeable future deliver such first lien mortgages [T.R. page 50, line 1].

4. At no time did Monroe Street Properties tender the first mortgages to appellee or into escrow [T.R. page 50, line 3].

5. Appellant has never been in a position to and ready to consummate the transaction [T.R. page 50, line 7].

6. Mr. Snell, on his examination of the Memorandum Title Report, was of the opinion that merchantable title of first liens on the property was not available to appellant, that appellant would be and was wholly unable to perform [T.R. page 50, line 14].

7. Appellee abandoned the proposal and considered it terminated by mutual agreement [T.R. page 50, line 9].

8. Appellee assumed appellant had repudiated and terminated the contract following June 29th, 1962, in that no further demand was made upon it after that date [T.R. page 49, line 27 through page 51].

The Mack affidavit fully answers the Snell affidavit in the following particulars:

1. On April 10th, 1962, Mack wrote to appellee, informing it that appellant had performed its obligations under the escrow and that upon performance by appellee by the delivery of the stock, Union Title Company would insure the mortgages as first mortgage liens [T.R. page 97, paragraph 4].

2. On April 11th, 1962, escrow officer C. D. Dieckhoff wrote to appellee and informed it that appellant had complied with their portion of the escrow and were calling upon appellee to deliver the shares

of stock [T.R. page 97, paragraph 5].

3. On May 7th, 1962, Mack delivered to appellee's attorney, Richard B. Snell, copies of the Preliminary Title Report, escrow instructions, mortgages, notes and assignments and a copy of the original offer made by appellee [T.R. page 96, paragraph 7].

4. That arrangements had been made for the satisfaction of the various requirements set forth in the Union Title Preliminary Title Report; that numerous items, to Mack's personal knowledge, were to have been satisfied and could have been satisfied without the payment of any consideration whatsoever; as to those requirements which necessitated the payment of monies, that suitable arrangements had been made by Union Title Company and appellant to satisfy said requirements by utilization of the stock to be delivered by appellee [T.R. pages 98 and 99].

5. That in order to satisfy the requirements of the Preliminary Title Report and in order for Union Title Company to issue its policy insuring the mortgages as first lien mortgages, it was necessary for appellee to deliver to the escrow the required shares of stock [T.R. pages 99 and 100, paragraphs 9 through 11].

In Arizona, it is a well established rule that if the vendor in a contract for the conveyance of real estate is able to make a good title at the time he is required to do so under the terms of the contract, he may not only maintain an action at law for damages for a breach by the purchaser, but additionally may compel specific performance, and he is in default under such a contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. See *Steward v. Sirrine*, 34 Ariz. 49, 267 Pac. 598 (1928); *Walker v. Estavillo*, 73 Ariz. 211, 240 P.2d 173 (1952).

As enunciated in the *Estavillo* case, *supra*, and in quoting the *Steward* case, the Arizona Supreme Court stated:

> "If vendor is able to make a good title at the time stipulated for, he may not only maintain an action at law for damages for breach by purchaser, but may also sue to compel specific performance by the purchaser and recover agreed consideration, *and vendor is only in default when the purchaser has performed his part of the contract and made demand for title which the vendor is unable to furnish.*"
> (Emphasis supplied)

These cases arise where a contract is made for the sale of land which the vendee does not have title

to at the time of the making of the contract and justification for the vendee's breach is sought to be approved by virtue of the lack of title. In *Backman et al v. Park et al*, 157 Cal. 607, 108 Pac. 686 (1910), the court, in quoting from *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, stated:

> "The conveyance by the vendor was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent on him to offer to perform, or to show that at the time of performance the vendor could not furnish the title."

This principle is applicable on all fours with the issue raised by the appellee in its Motion for Summary Judgment. The parties had a contract for the sale of an interest for realty (mortgages) in exchange for personalty (stock certificates). Perhaps at the time the contract was made, the appellant's title was incomplete in the sense required by the contract. However, the contract did not provide nor oblige the appellant to furnish complete title, as prescribed by the terms of the contract, until such time as the

appellee had tendered the stock (see Exhibit "B" annexed to appellant's Response to the Motion - T.R. 102). In view of the principles hereinbefore cited and applying the same to these facts, it would appear that the status of appellant's title at the time the contract was made, or at any time prior to the date that appellee made a tender of the stock, was immaterial, but that upon such tender it would be incumbent upon the appellant to deliver precisely what the appellee had bargained for. Under the appellee's view of the case, it would relieve itself of the obligations of any contract by *merely assuming* that the other party may not possibly perform, which here, in view of the rules cited, is not a fact necessary to the ultimate recovery by the appellant, that never having been made a requirement by the appellee.

Viewing the documents in support of the appellee's Motion, we find the letter of Ira S. Broadman, dated June 27th, 1962 [T.R. page 52]. This letter clearly and unequivocally invited appellee to place the appellant in a position which would require appellant to deliver the mortgages bargained for. However, based on the opinion of appellee's counsel, as to what the appellant might or might not be able to do in the

future, appellee elected to repudiate the contract at that point rather than to place the appellant in a position where such performance would be required. With respect to this latter point, should the Court construe the appellant's communication as merely an offer of tender, here again such offer was all that was required until appellee itself tendered the stock. In *Glad Tidings Church of America v. Hinkley*, 71 Ariz. 306, 226 P.2d 1016 (1951), the court stated the general rule and the modifications thereof:

> "* * * 'The vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment.' While there is some authority to the contrary, the above appears to be the general rule. *However, we believe that an offer of tender is sufficient in a notice of forfeiture if there is an expression by the vendor in his notice of forfeiture that upon payment by the vendee, the vendor is ready, willing and able to tender and deliver a deed upon receipt of payment. We believe that the general rule as modified by the conditional tender as above stated is the better rule.*"
>
> (Emphasis supplied)

There is no doubt in counsel's mind that the Court can almost take judicial knowledge of the fact that in every escrow calling for the conveyance of real property

or interests therein, there are requirements to be met and more often than not, the vendee's compliance is necessary in order for the stakeholder or title company to deliver the vendor's interest in the manner contracted.

In view of the law as above set forth, the trial court actually tried the disputed issues and resolved them in favor of appellee. This it cannot do. Appellant is entitled to a trial on these disputed issues of fact. The court on a motion for summary judgment cannot assume, by weighing the respective affidavits, that appellant could not perform the contract.

III. THE TRIAL COURT ERRED IN CONSIDERING THE AFFIDAVITS OF RICHARD SNELL AND MARIE PEIPELMAN IN THAT SAID AFFIDAVITS ARE AT BEST HEARSAY AND OPINION DOCUMENTS, CONTAIN THE AFFIANTS' CONCLUSIONS OF LAW AND DO NOT CONFORM WITH THE REQUIREMENTS OF RULE 56(e), FEDERAL RULES OF CIVIL PROCEDURE.

The provision controlling the form of affidavits is Rule 56(e), Federal Rules of Civil Procedure, which provides:

> "*Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,* and shall show affirmatively that the affiant is competent to testify

to the matters stated therein. *Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."*
(Emphasis supplied)

Firstly, we shall examine the affidavit of Marie Peipelman, which is annexed to appellee's Motion [T.R. pages 61 through 81]. It is fair to characterize her affidavit as a title report, of the type commonly used in real estate transactions in the State of Arizona, in the guise of an affidavit. The affidavit failed to indicate when the examination of title was made and certified copies, as required by Rule 56(e), of the documents referred to in said affidavit were not attached thereto

With due respect to Marie Peipelman's qualifications as a title officer, the entirety of her affidavit still represents at best an opinion on the condition of title and is a hearsay document, replete with conclusions of law.

Secondly, turning to the Snell affidavit, we find this document contains the opinion of its maker, predicated on a knowledge undisclosed and unknown either to the court or to appellant. Snell speaks in his affidavit about examining a Preliminary Title Report rather

than the records themselves, and these records are neither certified nor annexed to his affidavit and made a part thereof. On page 2, line 11 [T.R. page 49], he endeavors to justify the breach of contract by appellee by giving an interpretation of the contract which has yet to be litigated between the parties and is a material issue of fact to be determined --that issue being whether or not appellant could have performed its obligations under the contract calling for concurrent conditions. On line 16 of said page, he expresses an opinion as to what appellant was proposing to do with the stock that appellee failed to deliver to the escrow, which was wholly conjectural on his part.

Thus the affidavit is nothing more than retrospective justification for breach of contract and mere rationalization based upon a subjective hypothesis and clearly in non-conformity with the requirements of Rule 56(e).

In the previous section we have summarized the remaining portions of the Snell affidavit, wherein he discusses appellant's ability or inability to perform and states that the agreement had been abandoned and

terminated. But at no time does Mr. Snell's affidavit set forth the source of his knowledge, which may be opinion, conclusions of law, hearsay or guesswork.

In neither affidavit does appellee show that the affiant is competent to testify to the matters stated in their respective affidavits.

Only minimal citation of authority is necessary for the proposition that under Rule 56(e), *supra*, statements in affidavits as to opinion, belief, or conclusions of law, are of no effect. The same may be said of statements which would be inadmissible in evidence. Hearsay statements contained in affidavits cannot be considered in determining the motion. See *Jameson v. Jameson*, 176 F.2d 58; *State of Washington v. Maricopa County*, 143 F.2d 871; *Transo Envelope Co. v. Murray Envelope Co.*, 227 F. Supp. 240; *Engelhard Industries Inc. v. Research Instruments Corp.*, 324 F.2d 347, *cert. den.*, 84 S. Ct. 1220, 377 U.S. 923, 12 L. Ed. 2d 215; 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1237.

If the trial court had properly disregarded those portions of the affidavits which fail to comply with Rule 56(e), clearly the meat of the nut would be gone

and all that would be left would be a shell which, standing alone, could by no stretch of the imagination, support the granting of the Motion for Summary Judgment.

IV. THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW AND IN SO DOING IT FOUND FACTS NOT CONTAINED IN THE RECORD, NOR ACCURATELY REPRESENTED THEREIN AND DREW CONCLUSIONS OF LAW CONTRARY TO THE DECISIONS INTERPRETING SUCH FACTS. RULE 56(a), FEDERAL RULES OF CIVIL PROCEDURE

In the instant case, the trial court made Findings of Fact and Conclusions of Law and entered Judgment [T.R. pages 148 through 156]. Preliminarily, it is of interest to note that Rule 52(a), Federal Rules of Civil Procedure specifically states as follows:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 . . . ."

In 2B Barron & Holtzoff, *Federal Practice and Procedure*, § 1125, the authors discuss the reason for the rule which makes finding unnecessary on motions for summary judgment. Their statement is especially applicable to the case at bar:

> "If the facts are so complicated that inconsistent inferences may reasonably be drawn therefrom, the case is hardly suitable for determination on a motion for summary judgment."

It should be further noted that neither party requested Findings of Fact and Conclusions of Law and that the same was done only upon the court's motion.

It would serve no useful purpose for appellant to itemize the court's Findings and the Objections thereto. The appellant filed Specific Objections to the appellee's Proposed Findings of Fact and Conclusions of Law [T.R. page 131] as well as its own Proposed Findings of Fact and Conclusions of Law [T.R. page 139].

The Findings of Fact and Conclusions of Law approved by the trial court are but a blanket endorsement of the statements contained in appellee's affidavits and exhibits and totally disregard the Mack affidavit and exhibits attached thereto.

If this case is so complicated that the court determined that Findings of Fact and Conclusions of Law were necessary, then, as stated in 2B Barron & Holtzoff, *Federal Practice and Procedure*, § 1125, it is "hardly suitable for determination on a motion for summary judgment."

Conclusion

The trial court in granting appellee's Motion for Summary Judgment subverted the purposes of Rule 56 in that it actually tried, on the merits, disputed material fact issues when it should only have determined whether or not material issues of fact existed. The affidavits, exhibits, and answers to interrogatories show the existence of material issues of fact, and once shown, the court must deny the motion.

In view of the foregoing, appellant respectfully requests that the judgment of the United States District Court for the District of Arizona, be reversed.

Respectfully submitted,

KANNE, BICKART & CROWN

By /s/ Allen B. Bickart

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Allen B. Bickart

Allen B. Bickart